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HAROLD B. WILLEY

No. 609

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

HENRY S. CATO, PETITIONER

v.

CYRUS E. SILLING, SR., RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

J. CAMPBELL PALMER III
206 May Building
Charleston, West Virginia
Counsel for Petitioner

HOOD HIBERNIAN CO., CHARLESTON, W. VA.

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Henry S. Cato, petitioner, prays that this Court grant a rehearing of its Order of April 4, 1955, denying his petition for a writ of certiorari, and that a writ of certiorari issue to reverse the judgment of the Supreme Court of Appeals of West Virginia in the above-entitled case as prayed for in the petition filed February 21st 1955 herein.

REASONS FOR GRANTING THE REHEARING AND ISSUING THE WRIT

1. Petitioner's counsel received only one copy of the brief in opposition, and petitioner, himself an attorney, received no copy of it until March 30. Immediately upon such receipt, petitioner requested his counsel to prepare a reply to it. Counsel prepared this reply, and petitioner in person had just completed proof-reading it with the printer, and turned it over to the latter, on April 4, 1955, when the telegram from the Clerk to his counsel announced the refusal of the certiorari. However, petitioner in person directed the printer to complete the brief and to mail it to the Clerk of this Court, and it was so mailed on Tuesday, April 5.

This Court acted before the reply to the brief in opposition was submitted, and it was returned as being filed too late. The reply to the brief in opposition was very petinent to the issue in this case, and set forth the following argument;

"Respondent's brief in opposition, particularly on page 7 thereof, challenges petitioner's being a tenant of respondent, and the entire brief is based upon that premise.

At page 3 of the statement of respondent, it is stated:

> "During those years, he (respondent) leased the entire premises to Clara Williams Allen, who operated a rooming house thereon. Tenant Allen held the property as lessee under a written lease from respondent Silling's predecessor in title."

At page 12 of the Appendix to the Petition for Certiorari is quoted an excerpt from Controlled Housing Rent Regulations, Housing Evictions, April 1, 1949, in effect during the period in question, under sub-paragraph (g), heading Exceptions; "The provisions of this section do not apply to ** (1) Sub-Tenants:

> "A sub-tenant or other person who occupies or occupied under a rental agreement with the tenant, where removal or eviction of the sub-tenant or other such occupant is sought by the landlord of the tenant, *unless the rental agreement between the landlord and tenant contemplated the sub-letting by the tenant of the entire accommodations or substantially all of the individual units therein* ***. "

The original record before the Court shows conclusively that the entire premises were leased by the landlord to the tenant Allen.

The above-quoted statement from respondent's opposition brief admits the entire premises were leased.

Therefore, under the Housing Regulations as above-quoted, since the rental agreement between the landlord and tenant Allen did contemplate the sub-letting by the tenant Allen of the entire accommodations and the record shows that such was the fact, the entire argument of respondent that the necessary relationship did not exist must fail.

Again at page 5 of respondent's brief, it is stated: "All sub-tenants moved except petitioner Cato." The reply brief further admits that the Housing Expediter served notice on the sub-tenants, including petitioner Cato, of the actions before the Housing Expediter.

Therefore, it is respectfully submitted that since the entire reply brief is based upon an erroneous assumption of law, it should not be held by this Court to be effective, but petitioner's original brief should, therefore, stand unchallenged."

2. The reason the reply to the brief in opposition is of particular importance is because of the case of *Ewing vs. Coal and Coke Ry. Co.*, 82 W. Va. 427, 96 S. E. 73, in which this Court denied certiorari (247 U. S. 521), wherein the Supreme Court of Appeals of West Virginia held:

> "Though the Federal Safety Appliance Act of March 2, 1893, as amended March 2, 1903, and April 14, 1910, contains no express language conferring a right of action for the death or injury of an employe occasioned by a failure to comply with its requirements, a right of action therefor, nevertheless, is within the contemplation and intendment of the Act."

We submit that holding in a Federal question is at complete variance with the holding in the instant case, which merits a review by this Court.

CONCLUSION

For the reasons set forth above and in the petition for certiorari, it is respectfully submitted that a rehearing should be granted, and that upon such rehearing a writ of certiorari should issue to the Supreme Court of Appeals of West Virginia.

Respectfully submitted,
J. CAMPBELL PALMER III,
Counsel for Petitioner

CERTIFICATE OF COUNSEL:

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, as delay would avail petitioner nothing and would not harm respondent, and is restricted to grounds specified in Rule 33 of the Rules of this Court.

J. CAMPBELL PALMER III,
Counsel for Petitioner

SERVICE:

I hereby certify that service of this petition to Rehear was made by delivering copies thereof to counsel for respondent at his office, 705 Kanawha Valley Building, Charleston, West Virginia, on the 19th day of April, 1955.

Respectfully submitted,

J. CAMPBELL PALMER III
Counsel for Petitioner